STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 263435 Wayne Circuit Court
KIERRE SMART, a/k/a JASON SMARTT, Defendant-Appellant.	LC No. 05-001373-01

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of possession with intent to deliver between 50 and 449 grams of cocaine, MCL 333.7401(2)(a)(iii); felon in possession of a firearm (felon in possession), MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to a term of 100 months to 20 years in prison for the possession with intent to deliver cocaine conviction, a concurrent term of one to five years for the felon in possession conviction, and a consecutive term of two years for the felony-firearm conviction. We affirm.

On August 3, 2004, Detroit Police Officer LaMar Penn, acting on an anonymous tip that narcotics were being sold out of a house at 20027 Annott in Detroit, performed surveillance at that location. Penn observed defendant come out of the house with a black duffle bag; defendant handed the bag to a man who was sitting in a burgundy LaSabre in the driveway. The man gave defendant a stack of U.S. currency that appeared to be approximately three inches thick, and defendant went back into the house. Based on this and other information concerning the license numbers of vehicles at the location, Penn obtained a search warrant for the home.

During execution of the search warrant two days later, police officers seized a garbage bag box from the top of the refrigerator in the kitchen; the box contained a .30-caliber revolver with five live rounds and narcotics paraphernalia in the form of a small, black scale and numerous one-by-one-inch baggies. A Remington .35-caliber pump rifle was discovered on the wall in the basement of the home. Two dressers in the northeast bedroom in the house contained men's and women's clothing. In the top drawer of one of the dressers, officers found two large uncut chunks of cocaine, along with approximately 105 Ziploc baggies containing cut cocaine. The drawer also contained proof of residence in the form of pictures of defendant, Sears Portrait Studio pictures of defendant, a baby, and a woman, and mail addressed to defendant. A nine-

millimeter handgun and a magazine containing ten live rounds were confiscated from underneath the mattress in the bedroom.

On appeal, defendant, through appellate counsel, first argues there was insufficient evidence to support his convictions. Specifically, defendant contends there was insufficient evidence that he possessed either a firearm or narcotics where the only relevant testimony presented was that controlled substances and firearms were found in areas of the residence which several other persons who lived there had access to, when defendant was not present at the time of the execution of the search warrant, and when there was no evidence that defendant even knew the illegal items were present.

In reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39; 642 NW2d 339 (2002); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

The elements of possession with intent to deliver between 50 and 449 grams of cocaine are: (1) the recovered substance is cocaine, (2) the mixture weighs between 50 and 449 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the substance with the intent to deliver. *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003). To prove the offense of felon in possession, the prosecution must establish that the defendant possessed a firearm and that the defendant had been convicted of a prior felony. If the defendant produces evidence of restoration of his right to possess a firearm, the prosecution must additionally prove lack of restoration. *People v Perkins*, 473 Mich 626, 636-640; 703 NW2d 448 (2005), discussing MCL 750.224f. The required elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *People v Warren* (*After Remand*), 200 Mich App 586, 588; 504 NW2d 907 (1993). This Court must afford deference to the factfinder's special opportunity and ability to determine the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992) , amended 441 Mich 1201 (1992).

To establish possession of a firearm, the prosecution must establish either actual or constructive possession of the firearm. *Burgenmeyer*, *supra* at 438. "A person has constructive possession if there is proximity to the article together with indicia of control." *Id*., citing *People v Davis*, 101 Mich App 198; 300 NW2d 497 (1980). Constructive possession of a firearm is established "if the location of the weapon is known and it is reasonably accessible to the defendant." *Burgenmeyer*, *supra* at 438. Physical possession of the firearm is not necessary as long as the defendant has constructive possession. *Id*., citing *People v Terry*, 124 Mich App 656; 335 NW2d 116 (1983). Similarly, the prosecution is not required to demonstrate actual possession in order to establish possession with intent to deliver cocaine; constructive possession will suffice. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). "Constructive

possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *Id.*

The totality of the circumstances demonstrates a sufficient nexus between defendant and the cocaine, and sufficient evidence was presented to establish that defendant knew of the location of a firearm and had reasonable access to it. Although defendant was not present at the time of the execution of the search warrant, the prosecution presented evidence that he indeed resided in the home. While surveilling the Annott location two days before execution of the warrant, Officer Penn observed defendant come out of the house and engage in what appeared to be a drug transaction in the driveway; defendant then re-entered the house. The bedroom in which the cocaine and a firearm were seized contained men's clothing, and the very drawer in which the cocaine was found contained pictures of defendant and four mail items addressed to him at the Annott address. A firearm was found underneath the mattress in this bedroom. Viewed in a light most favorable to the prosecution, this evidence permitted as a reasonable inference that defendant possessed the cocaine found on the premises, and that he had control over a firearm. See *People v Hardiman*, 466 Mich 417, 421-423; 646 NW2d 158 (2002); *Johnson*, *supra* at 500. It is for the trier of fact to weigh the evidence introduced at trial. *Hardiman*, *supra* at 428.

Defendant next argues that he is entitled to a new trial because statements made by his girlfriend, Keisha Salter, to police during execution of the search warrant were used against him in violation of his constitutional right of confrontation. Defendant contends that Salter's statements that the contraband in question belonged to defendant and that he had left the house only fifteen minutes prior to the raid constituted inadmissible hearsay, and that this testimonial evidence was admitted in violation of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Appellate review of this issue is precluded because it was *defendant himself* who elicited the complained-of testimony on cross-examination of Officer Penn. It is clear from the exchange between defense counsel and Penn that counsel purposely elicited testimony concerning Salter's statements in order to demonstrate that Penn had failed to properly question witnesses or to make a proper record of the investigation, and that he was therefore not a credible witness. Indeed, in closing argument, counsel argued at length that Penn had lied on the stand, because neither of Salter's statements was contained in any police report. A defendant may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). "Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Appellate review of such an error is precluded because "when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003); see *Carter*, *supra* at 214-215. Moreover, any error stemming from admission of the statements was harmless. Penn had witnessed defendant at the residence two days before the execution of the search warrant, and mail addressed to defendant, along with pictures of defendant and his family, were found in the drawer together with the contraband. Thus, to the extent that Salter's statements tend to establish that defendant had recently been in the house and that the contraband belonged to him, they were merely cumulative and could not have affected the outcome of the

proceedings.[1] See *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In a supplemental brief filed in propria persona pursuant to Administrative Order No. 2004-6, Standard 4, defendant argues that the search warrant was invalid for several reasons. Defendant further contends that trial counsel was ineffective in failing to file a motion to suppress the search warrant or to request an evidentiary hearing.

Defendant failed to object to the validity of the search warrant below. Therefore, this issue is not preserved for appellate review, and this Court's review is for plain error affecting defendant's substantial rights. *Carines, supra* at 764.

The search warrant and affidavit are not contained in the lower court record. Although defendant appears to have quoted from portions of the search warrant affidavit in his brief, he has not provided this Court with a copy of that document; nor has he moved to expand the record to include the warrant and affidavit. Therefore, this Court may not consider those items. Appeals are heard on the original record, MCR 7.210(A)(1), and it is impermissible to expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Moreover, we have examined defendant's claims concerning the invalidity of the warrant and conclude that they are meritless. Likewise, defendant's claim of ineffective assistance of counsel must fail, as trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis

[1] In light of our resolution of this issue, we need not address whether admission of Salter's statements constituted a *Crawford* violation. See *People v Shepherd*, 472 Mich 343, 347 n 4; 697 NW2d 144 (2005).